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No. 88-701

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE NO. 19,
Petitioner,

v.

SOO LINE RAILROAD COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. When the validity of a railroad's voluntary individual severance program turns on the interpretation of certain employee protective conditions imposed by the Interstate Commerce Commission ("ICC"), and those conditions contain an express mandatory arbitration clause, whether jurisdiction to render that interpretation lies in the district court or in an arbitration board subject to review by the ICC.

2. When the validity of such a program also turns on the interpretation of an employee protective agreement entered into pursuant to such ICC conditions and the railroad's interpretation is at least "arguable," whether jurisdiction to render that interpretation lies in the district court or in an arbitration board under the Railway Labor Act's "minor dispute" principles.

LIST OF PARTIES

The caption of the petition for certiorari properly lists all parties. Pursuant to Supreme Court Rule 28.1, respondent's parent companies, subsidiaries and affiliates are Soo Line Corporation, Canadian Pacific Limited, and Indiana Harbor Belt Terminal Company.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Soo Line Railroad Company ("Soo Line") submits this brief in opposition to the petition for certiorari.

PRELIMINARY STATEMENT

The question presented here is whether a court or an expert arbitration board has jurisdiction to decide whether the Soo Line's voluntary severance program—under which excess employees were permitted to retire or resign voluntarily in exchange for a lump sum severance payment—is authorized by, or at least not inconsistent with, certain standard employee protective condi-

tions previously imposed on the parties by the Interstate Commerce Commission ("ICC").

The union and the dissents below have fundamentally misunderstood that the Soo Line's primary position is that the ICC conditions *incorporate, and affirmatively authorize,* voluntary individual early retirements by senior employees as an alternative to involuntary furloughs of junior employees during a reduction in forces. If that interpretation of the ICC conditions is correct, then the "direct dealing" cases relied on by the union are irrelevant, for the Soo Line will have been acting pursuant to authority granted by the ICC, not unilaterally "bypassing" the union. It is true, to be sure, that the union and the dissent have a different reading of the conditions, which they view as implicitly forbidding such voluntary retirements. This case therefore poses the question whether jurisdiction to choose between the parties' conflicting interpretations of the ICC conditions lies in the district court, as the unions and dissents below assert, or with an expert arbitration board, as the Soo Line and Eighth Circuit majority believe. As we show below, overwhelming precedent supports the Soo Line and Eighth Circuit majority's view, based both on an express mandatory arbitration clause in the ICC conditions—an alternative holding by the Eighth Circuit that the IAM *never even mentions* in its petition—and on the "minor dispute" principles of the Railway Labor Act ("RLA"). Indeed *no* precedent supports the union's contrary position, and certiorari should therefore be denied.

Certiorari should be denied for the further reason that even if the ICC conditions did not affirmatively authorize the severance program and hence the union's "direct dealing" cases were applicable here, those cases support the Soo Line, not the IAM. It is settled under those cases that employers may enter into agreements directly with individual employees so long as those agreements are not in conflict with the employer-union agreement. As the

Eighth Circuit majority recognized, that question similarly depends upon a resolution of the parties' competing interpretations of the ICC-imposed conditions, which were incorporated into the parties' employee Protective Agreement, and again arbitration is the exclusive means to resolve that question of interpretation. We also show below that, in any event, the terms of individual separations are not a mandatory subject of collective bargaining.

Not only do the union's theories have no merit, thus, but there is no conflict among the courts on these points. Indeed, the principal other individual severance case relied upon by the IAM was decided in the *railroad's* favor. The courts have recognized, moreover, that disputes over individual severance programs must be resolved on a case-by-case basis. For these reasons, certiorari should be denied.

COUNTER-STATEMENT OF THE CASE

1. *The ICC-imposed labor conditions and subsequent Protective Agreement.* In February, 1985, the Soo Line, under the auspices of the Milwaukee Railroad Restructuring Act, 45 U.S.C. §§ 901-22, bought the railroad operations of the bankrupt Chicago, Milwaukee, St. Paul & Pacific Railroad Company (the "Milwaukee"). Pet. App. 3a. The Soo Line informed both the ICC and the federal reorganization court that several hundred employees would lose their jobs as a result of the consolidation. *Id.* at 6a. In this regard, the Restructuring Act required that the ICC impose labor protective conditions "at least as protective of the interests of employees as [those] required under section 11347" of the Interstate Commerce Act. *Id.* at 4a. Under § 11347 (and its predecessor § 5(2)(f)), the ICC has for many decades imposed a standard set of job security protections—called *New York Dock* protections—as a condition of its approval of hundreds of railroad sales, transfers, or abandonments.

Id. at 5a; see generally *New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979). The ICC recommended, and the reorganization court agreed (with a few changes not relevant here), that those *New York Dock* protections be applied to the Milwaukee-Soo Line consolidation. Pet. App. 6a.

The *New York Dock* conditions (Eighth Cir. J.A. 123-30) provide, *inter alia*, (1) that if a protected employee is furloughed as a result of the sale, he or she must continue to be paid, generally for six years, the equivalent of the wage earned at the time of the furlough unless he or she chooses instead to take a one-time payment of up to a year's pay; (2) that an employee will lose his "protected" status in the event of his "retirement" or "resignation"; (3) that the railroad and unions must negotiate an "implementing agreement" incorporating the conditions and resolving seniority and contract rights; and (4) that mandatory and exclusive arbitration must be used to resolve "any dispute or controversy with respect to the interpretation, application or enforcement of any provision" of the conditions. Pet. App. 5a.

As required by the *New York Dock* conditions, the Soo Line and petitioner IAM, in September 1985, entered into the so-called "Protective Agreement." Pet. App. 7a; see Eighth Circuit J.A. 103-12.[1] The Protective Agreement both incorporated the *New York Dock* conditions and contained its own mandatory arbitration clause. *Id.* at 7a, 25a. It also established seniority rosters for use in determining, in the event of furloughs, the order in which employees would be furloughed and, in such an event, entitled to protective benefits under the conditions. *Id.* at 7a.

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[1] Contrary to petitioner's assertion (p. 4) that the Protective Agreement was entered into because "[r]ail labor was dissatisfied with the [*New York Dock*] conditions," it in fact was mandated by *New York Dock* and incorporated the *New York Dock* conditions. Pet. App. 7a.

2. *The railroad's voluntary severance program.* Contrary to petitioner's suggestion (at 15) that voluntary severance agreements between railroads and individual employees are of recent vintage, they in fact date back at least to the early 1950's. Moreover, whenever they have been challenged by a union, they have consistently been upheld by arbitration boards. In *System Fed'n No. 2* v. *Missouri P. R.R.*, Award No. 1579 (NRAB 2d Div. 1952), the Board upheld such an agreement, holding "[w]e find nothing in the parties' agreement or in the Railway Labor Act that prohibits the making of the contract between [the employee] and the carrier." Individual severance agreements were also upheld over union challenges in, *e.g.*, *System Fed'n No. 69* v. *Florida East Coast Ry.*, Award No. 4733 (NRAB 2d Div. 1965) ("is indisputable that an employee has an absolute right to resign from his job; it seems to be a logical extension of this concept to go further and conclude that an employee has the right to resign in exchange for a monetary consideration"); *Burlington Northern, Inc.* v. *BRAC*, Award No. 16 (S.B.A. 1975); and *Brotherhood Railway Carmen* v. *Illinois Central Gulf R.R.*, Award No. 6 (NMB P.L. Bd. No. 2608 1980). Indeed § 9 Eighth of the RLA expressly preserves each individual employee's absolute right to leave a railroad's service. 45 U.S.C. § 159 Eighth.

In sum, the ICC was well aware, when it formulated *New York Dock* and other standard employee protective conditions, that railroad arbitrators had consistently read standard protective agreements to contemplate an individual employee's right to resign or retire in exchange for a severance allowance, as a permissible means for the railroads to reduce forces without needlessly incurring large protection obligations for employees sitting at home doing no work. As shown below, that view is reinforced by the language of the conditions, which expressly contemplate the termination of benefits in the event of an employee's "resignation" or "retirement."

By and large, unions have looked favorably on, and acquiesced in, the making of such individual severance agreements when job abolishments are impending. Such programs (1) permit senior employees nearing retirement age, who would like to retire early or who otherwise would have to relocate when their jobs are abolished, to instead retire from service in exchange for a lump-sum separation payment; (2) permit junior employees who would otherwise be furloughed and out of work (as a result of job bumping by senior workers) to continue to hold productive, paying jobs; and (3) permit the railroad to avoid paying relocation allowances to senior employees and paying protection allowances to junior workers for sitting at home.

In December 1985, in order to avoid those latter economic hardships to the railroad and to present these favorable opportunities voluntarily to both junior and senior employees, the Soo Line instituted precisely the kind of voluntary severance program widely employed in the industry and upheld by railroad arbitrators. Pet. App. 7a-8a. Under that program, the Soo Line offered senior employees $15,000 (plus continued health benefits to employees over 60) in exchange for their early retirement from service, thereby creating needed vacancies for junior employees who would otherwise be furloughed. *Id.* at 8a. The program was offered to members of 10 unions, not including petitioner IAM; none of these unions complained about the program (thus showing that they too viewed the program as consistent with the ICC-imposed conditions), and nearly 400 union-represented employees accepted the voluntary retirement offers. *Id.* at 8a-9a.

During the course of the program, eight IAM members over 60 years of age approached the Soo Line and asked to participate. *Id.* at 9a. Their requests were honored and they were paid $15,000 plus health bene-

fits in exchange for their early retirements. *Id.* Petitioner IAM thereupon filed suit. *Id.* at 9a-10a.[2]

3. *The decision below.* In courts below, the union argued that the severance program was an impermissible effort to escape what it saw as the Soo Line's obligations under the *New York Dock* conditions, as incorporated by the Protective Agreement. Pet. App. 10a. The union asserted that under *New York Dock*, a railroad seeking to reduce forces has no choice but to relocate senior employees to positions held by junior employees and then pay the furloughed junior employees full wages for up to six years for sitting at home. *Id.* at 10a, 27a. The Soo Line countered that it read *New York Dock* as allowing it to permit the senior employees to retire voluntarily in return for a severance allowance, thus avoiding the need to furlough junior employees and to pay them for sitting at home. *Id.* at 18a. As shown at page 15 below, the Soo Line cited various facts supporting that interpretation. The Soo Line also argued that, in any event, individual retirements are not a subject of mandatory bargaining. *Id.* at 13a.

The Eighth Circuit held, first, that "there was strong support for the Soo Line's position" that severance programs are not a subject of mandatory bargaining, because the Act expressly preserves an individual employee's "right to terminate his employment on terms he finds acceptable." *Id.* at 13a-14a. The court did not resolve that issue, however, because it found that, in any event, the dispute had to be arbitrated for two separate reasons. *Id.* at 14a. First, arbitration was found necessary because (1) disputes over the interpretation of railway

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[2] When the IAM objected, the carrier agreed to try to negotiate a settlement of the dispute, but, as petitioner now concedes (p. 8 n.2) and the Eighth Circuit recognized (Pet. App. 9a n.6), the Soo Line expressly did so "without prejudice to the carrier's right to unilaterally accept separation requests" in the event no agreement could be reached.

labor contracts are arbitrable "minor disputes" under the standards employed throughout the Circuits so long as the railroad's interpretation is at least "arguable" (*id.* at 15a-17a); (2) the question whether the severance program was "in direct conflict" with the ICC conditions, as incorporated by the Protective Agreement, required construing those conditions (*id.* at 18a); and (3) the Soo Line's interpretation of the ICC conditions as allowing individual severances is at least "arguable" (*id.* at 19a-25a). The court emphasized that because participation in the program was "completely voluntary," it could well be read by an arbitrator not to detract from the ICC conditions and Protective Agreement, either in terms of benefits or employee seniority. *Id.* at 18a-19a nn.9 & 10. The court also noted that numerous other courts had reached the same ultimate conclusion. *Id.* at 19a-24a.

The other, "equally persuasive" reason for requiring arbitration relied on by the Eighth Circuit—although nowhere even mentioned in the union's certiorari petition—was the express arbitration clause found in both the *New York Dock* conditions and the Protective Agreement. *Id.* at 25a. The Eighth Circuit (1) noted this Court's recent reaffirmation of the extremely heavy presumption of arbitrability under such clauses (*id.* at 26a); and (2) found that there are at least several provisions of the Protective Agreement and the *New York Dock* conditions that can be construed to allow such severance programs (*id.* at 27a). The court therefore dismissed the case for lack of subject matter jurisdiction and remanded for arbitration. *Id.* at 29a.

Judge Lay's dissent was based on the premises, mistaken in the Soo Line's view, that (1) "neither [the general IAM-Soo Line collective bargaining nor the special protective] agreement covers this situation," and (2) that any unauthorized direct dealing with employees automatically violates the mandatory bargaining provisions of the RLA. *Id.* at 29a-30a. Judge Heaney's dis-

sent was based on his personal interpretation of the ICC conditions and the Protective Agreement and his resulting conclusion that the individual retirements had "reduced [the Soo Line's] obligations under the Labor Protection Agreement." *Id.* at 34a-36a, 41a.

REASONS FOR DENYING THE WRIT

I. The Court Below Correctly Applied Well-Settled Law In Concluding That Arbitration Is Required Under An Express Arbitration Clause And Under The "Minor Dispute" Principles Of The Railway Labor Act

We show in this Part that this case was correctly decided by the Eighth Circuit on the basis of well-settled principles. In Parts A and B we show that the court of appeals correctly enunciated the settled rules for finding questions of "interpretation" to be arbitrable under both express arbitration clauses and the "minor dispute" principles of the Railway Labor Act. In Part C we show that the ICC conditions must be "interpreted" to decide whether, as the Soo Line contends, the ICC conditions and the Protective Agreement incorporating those conditions authorize the severances at issue, or whether, as the union claims, the conditions provide no such authority and the Soo Line is acting unilaterally. In Part D we show that the ICC conditions must also be "interpreted" to see whether, even if they do not authorize the severances, they at least do not prohibit them, in which case it was entirely proper, under long-standing precedent, for the Soo Line unilaterally to deal directly with the employees in question. We also show at note 10 below that the entire issue of individual resignations is in any event not a mandatory subject of collective bargaining.

A. *Arbitration Clause Principles.* In its petition, the IAM startlingly fails even to mention one of the independent grounds relied on by the Eighth Circuit for referring the case to arbitration—an express arbitration

clause covering the parties' dispute. As the court below noted (Pet. App. 25a-26a & n.12), both the ICC conditions themselves and the Protective Agreement, which incorporated the conditions, contain mandatory arbitration clauses covering "*any* dispute or controversy with respect to the *interpretation*, application or enforcement of *any* provision [herein] . . ." (emphasis added). As the court of appeals also noted, this Court has recently emphasized the overwhelming presumption in favor of arbitration where such clauses are found:

> "where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that an order to arbitrate . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

AT&T Technologies, Inc. v. *CWA*, 475 U.S. 643, 650 (1986) (citation omitted), quoted at Pet. App. 26a. That is true "even if [the claim] appears to the court to be frivolous," for "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Id.* at 649-50. As this Court has made clear, moreover, those principles "are not new. They were set out by this Court over 25 years ago in a series of cases known as the *Steelworkers Trilogy*." 475 U.S. at 648, citing *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); and *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

Giving proper effect to the express arbitration clause found in ICC-imposed protective conditions, like the *New York Dock* conditions at issue in the case, is particularly essential, for it is through review of such arbitrations that the ICC ensures that its conditions are being interpreted and applied correctly. As the D.C. Circuit recently held, arbitrators interpreting and applying ICC-

imposed protective conditions are acting pursuant to authority delegated by the ICC. *IBEW* v. *ICC*, No. 87-1629, 1988 U.S. App. LEXIS 15954 (D.C. Cir. 1988). The court there accordingly affirmed the ICC's prerogative to review such arbitration awards in order to ensure that they comport to the ICC's intentions and statutory mandate. *Id.* Moreover, the D.C. Circuit has also held that these arbitration awards involving ICC-imposed conditions are ultimately reviewable in the court of appeals, and not in the district court. *UTU* v. *Norfolk & W. Ry.*, 822 F.2d 1114 (D.C. Cir. 1987).

Indeed, the Sixth Circuit recently emphasized that "every federal court which has interpreted § 11 of the New York Dock Conditions has concluded that arbitration is mandatory under that provision." *Atkins* v. *Louisville & N. R.R.*, 819 F.2d 644, 647-48 (6th Cir. 1987), citing, *inter alia*, *Walsh* v. *United States*, 723 F.2d 570, 574 (7th Cir. 1983); and *Hoffman* v. *Missouri P. R.R.*, 806 F.2d 800, 801 (8th Cir. 1986).

In sum, where any dispute arises involving the meaning or application of ICC-imposed protective conditions, that dispute must be resolved by arbitration, not a district court, both under standard arbitration clause principles and in order to preserve the ICC's jurisdiction over its delegated authority.

B. *Minor Dispute Principles.* Even where a case does not involve ICC-imposed conditions or an express arbitration clause, disputes over the "interpretation or application" of railroad-union agreements are still subject to mandatory and binding arbitration as a matter of law under § 3 of the Railway Labor Act, 45 U.S.C. § 153. As originally explained by this Court in *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 722-27 (1945), railway labor disputes fall into two classes. So-called "major disputes" involve a change in or a "clear departure from" the existing railroad-union agreement, while "minor disputes" involve controversies over the "interpretation or

application" of the existing railroad-union agreement. *Id.*; see also Pet. App. 15a-16a. If the dispute is major, the railroad's action is subject to being enjoined until the parties have exhausted the Act's procedures for changing agreements. See, *e.g.*, *BRT* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969). If the dispute is minor, by contrast, the dispute must be referred to an expert arbitration board to determine whether the railroad's action accords with the collective agreement. See, *e.g.*, *Andrews* v. *Louisville & N. R.R.*, 406 U.S. 320 (1972).

Where there is a dispute as to whether a railroad's action accords or conflicts with the applicable agreement, the dispute is deemed to be "minor" so long as the agreement is "reasonably susceptible" of the railroad's interpretation. Pet. App. 16a-17a. Put otherwise, "the dispute is minor unless the [railroad's] claims of contractual justification are 'frivolous' or 'obviously insubstantial.'" *Id.* That test for distinguishing between major and minor disputes not only is not in conflict, but indeed has been adopted by *all 10* of the courts of appeals to have passed on the issue.[3] Thus courts do not encroach on the statutory province of the arbitrator to resolve any arguable controversy over the meaning or application of labor contracts. *Id.* at 17a.[4]

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[3] See *Maine Central R.R.* v. *UTU*, 787 F.2d 780, 782 (1st Cir. 1986); *ALPA* v. *Trans World Airlines, Inc.*, 713 F.2d 940, 948 (2d Cir. 1983); *RLEA* v. *Consolidated Rail Corp.*, 845 F.2d 1187, 1190-91 (3d Cir. 1988); *Dement* v. *Richmond, F. & P. R.R.*, 845 F.2d 451, 463 (4th Cir. 1988); *APFA* v. *American Airlines, Inc.*, 843 F.2d 209, 212 (5th Cir. 1988); *Division No. 1, Detroit, BLE* v. *Consolidated Rail Corp.*, 844 F.2d 1218, 1221 (6th Cir. 1988); *C&NW Transp. Co.* v. *RLEA*, 855 F.2d 1277, 1282 (7th Cir. 1988); *IAM* v. *Soo Line R.R.*, 850 F.2d 368, 376-77 (8th Cir. 1988) (en banc); *BLE* v. *Burlington N. R.R.*, 838 F.2d 1087, 1091 (9th Cir. 1988); *Southern Ry.* v. *BLFE*, 384 F.2d 323, 327 (D.C. Cir. 1967).

[4] That standard is compelled not only by the general heavy preference for arbitration of labor disputes, see *Gateway Coal Co.* v.

C. *Arbitration as to Whether the ICC Conditions Authorize Voluntary Individual Severances.* In each of the cases involving individual severance programs litigated to date, the union has claimed—as the IAM does here—that the program constituted unilateral "direct dealing" that violated the union's statutory right as exclusive bargaining agent. Every court considering that claim has agreed (1) that individual severances are lawful, and do not constitute unilateral "direct dealing," if they are authorized by the railroad-union agreement, either expressly or impliedly; and (2) that any dispute as to whether the railroad-union agreement, properly interpreted, authorizes such severances is subject to mandatory and binding arbitration. In *BRAC* v. *Atchison, T. & S.F. Ry.*, 847 F.2d 403 (7th Cir. 1988); *IAM* v. *Illinois Central Gulf R.R.*, 102 Lab. Cas. ¶ 11,345 (S.D. Ill. 1984); and *BRAC* v. *Norfolk Southern Ry.*, No. 87-3137 (D.D.C. 1988), the courts held that arbitration was needed to decide whether the railroad's "past practice" evidence showed an implied agreement between the railroad and union authorizing individual resignations. In *TCU* v. *Grand Trunk W. R.R.*, 679 F. Supp. 696 (E.D. Mich. 1988), and *BRC* v. *Atchison, T. & S.F. Ry.*, CA 3-88-0089-T (N.D. Tex. 1988), *appeal pending*, No. 88-7012 (5th Cir.), the courts held that arbitration was required on the basis of the need to interpret both "past practice" evidence of an implied agreement and the express terms of the parties' written agreement, which—*as in this case*—recognized the possibility of an employee's "resignation" or "retirement." The *Atchison* and

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United Mine Workers, 414 U.S. 368, 381 (1974), but also by the particular need for expert arbitration of disputes over the meaning of railway labor contracts. See, *e.g.*, *Union Pacific R.R.* v. *Sheehan*, 439 U.S. 89, 94 (1978) (Congress considered it "essential" that minor disputes be kept "within the Adjustment Board and out of the courts"); *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, 566 (1946) ("Congress thus designated an agency [the adjustment board] peculiarly competent to handle" such disputes).

Norfolk Southern courts held that arbitration was compelled by the RLA's "minor dispute" rules; the *Illinois Central* and *Grand Trunk* courts found it to be obligatory under both the RLA's minor dispute principles and express arbitration clauses in the relevant railroad-union agreements.[5]

It is the Soo Line's position here that, properly interpreted, the *New York Dock* protective conditions and the Protective Agreement, which incorporated those conditions, affirmatively authorize the Soo Line to accept voluntary individual retirements. As noted above, the Restructuring Act required the ICC to impose a set of employee protective conditions, and the ICC imposed *New York Dock* conditions. It is well-settled that when the ICC imposes such conditions, their terms are binding on both the railroad and the union, and indeed may not even be changed by a subsequent railroad-union collective bargaining agreement that substantially abrogated rights of employees protected under the ICC conditions. See *Norfolk & W. R.R.* v. *Nemitz*, 404 U.S. 37 (1971). The *New York Dock* conditions, moreover, required the Soo Line and the union to enter into a so-called "implementing agreement," and the resultant Protective Agreement incorporated the terms of the *New York Dock* conditions, as the court below noted (Pet. App. 7a). In result, the terms of the *New York Dock* conditions are controlling with respect to employee protections between the Soo Line, the IAM, and its members.

As noted above, the IAM construes those *New York Dock* conditions as precluding voluntary resignations and instead requiring senior employees to relocate and bump junior employees, who end up being furloughed and being

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[5] The courts in *BRAC* v. *Chesapeake & O. Ry.*, 115 L.R.R.M. 3635 (N.D. Ohio 1983); and *Southern Pacific Transp. Co.* v. *BRAC*, 636 F. Supp. 57 (D. Utah 1986), enjoined individual severance programs only after finding that there was no past practice or written agreement evidence that might be interpreted as allowing such severances.

paid full wages for up to six years for sitting at home. In other words, the union believes that *New York Dock* benefits are not simply a shield for employees in the unhappy event that they are furloughed, but instead a sword that gives them an entitlement to be furloughed and to sit at home with full pay for up to six years. The Soo Line, by contrast, believes that the *New York Dock* conditions both expressly and impliedly authorize individual voluntary severances as an alternative, under which senior employees whose only right would be to continued work are permitted early retirement, while junior employees are kept on productive jobs. The Soo Line reaches that interpretation because (1) the conditions expressly state that their benefits do not apply in the event of an employee's "resignation" or "retirement"; (2) the conditions also provide more generally that their goal is to permit operation of the railroad "in the most efficient manner," which is inconsistent with paying people for sitting at home when others are willing to retire (Pet. App. 27a); (3) § 9 Eighth of the RLA expressly preserves an individual employee's right to separate from service, individual severances have thus been part of industry practice for many years (see page 5 *supra*), and it is reasonable to infer that the ICC incorporated that practice into the *New York Dock* conditions; and (4) no other union objected to the individual severance program, thereby evidencing their agreement with the Soo Line's interpretation (Pet. App. 8a-9a).[6]

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[6] In the district court, the Soo Line argued that the dispute was subject to mandatory arbitration and outside the district court's subject-matter jurisdiction, but only relied on the absence of any conflict between the severance program and the relevant agreements. In the court of appeals, however, the Soo Line clearly advanced the position that the *New York Dock* conditions contemplate and affirmatively authorize the individual severances. See, *e.g.*, Rehearing Petition pp. 1 ("these ICC conditions [] allow the offer of voluntary early retirement incentives"); 7 ("*New York Dock* conditions themselves expressly contemplate employee 'retirement[s]' and 'resignation[s]'"); 11 ("the conditions themselves contemplate the 'retire-

In sum, this case involves a dispute as to whether *New York Dock* conditions, both standing alone and as incorporated into the Protective Agreement, are properly interpreted as authorizing individual severances. As shown above, that interpretation is subject to arbitration, not the district court's jurisdiction, for two reasons. First, it goes to arbitration under the express arbitration clauses, in order to preserve the ICC's jurisdiction to review the award and ensure that it comports to the ICC's original intent in imposing the *New York Dock* conditions. Pet. App. 25a-28a. Second, it goes to arbitration as a "minor dispute" over the interpretation of the Protective Agreement, since the Soo Line's position is at the very least "arguable." Pet. App. 15a-25a. Accordingly, Judge Heaney erred in basing his dissent on his own personal interpretation of the *New York Dock* conditions, a task reserved exclusively to the arbitration board.[7] And Judge Lay went astray because he failed even to recognize the Soo Line's position that the *New York Dock* conditions authorize the railroad to accept voluntary retirement requests. For these reasons, and because there is no dispute as to these legal principles and no contrary decisions, certiorari should be denied.

Finally, contrary to the IAM's claim (pp. 22, 25), requiring arbitration (which IAM admits (p. 24) is standard practice in these cases) will not "deprive[] the IAM of a forum in which to enforce the statute's principle of exclusive representation." If the arbitration board finds that the individual severances are barred by *New York*

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ment' or 'resignation'" of employees); 14 (listing factors supporting this interpretation of *New York Dock*). Of course, this case in any event involves the question of subject matter jurisdiction and the interpretation of conditions imposed as a matter of law by the ICC, and hence no objection can be raised—nor has it been—that the Soo Line's position was not raised in the district court.

[7] As this Court held in *Union Pacific R.R.* v. *Sheehan*, 439 U.S. 89, 94 (1978), Congress considered it "essential" to keep these questions of interpretation "out of the courts."

Dock, and the Soo Line nonetheless persists, the union will be able to go into court either to enforce the award or for an injunction under the RLA. If, on the other hand, the arbitration board decides in the Soo Line's favor, then the IAM's claim here will be answered, for the railroad will have shown that it has not illegally bypassed the union, but instead has union's (and the ICC's) concurrence. In sum, arbitration will preserve the arbitrator's and ICC's proper roles in interpreting ICC conditions and still preserve the union's claims concerning its statutory rights; hence Judge Lay's fear of the result as "catastrophic" (Pet. App. 32a) is plainly misplaced.

D. *Arbitration as to Whether the ICC Conditions Do Not Conflict With Voluntary Individual Severances.* Even if the *New York Dock* conditions did not affirmatively authorize the severances, arbitration is still necessary to decide whether the severances are at least "not inconsistent" with the *New York Dock* conditions. As the Eighth Circuit said:

> "The [Supreme] Court has stated, simply, that certain individual employment contracts may exist side by side with a collective bargaining agreement. *See J.I. Case Co. v. National Labor Relations Board*, 321 U.S. 332, 339 (1944); *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 347 (1944); *Caterpillar Inc. v. Williams*, 107 S. Ct. 2425, 2431-32 (1987)." Pet. App. 14a.

In *J.I. Case*, this Court held that it knew "of nothing to prevent the employee's, because he is an employee, making any contract provided that it is not inconsistent with a collective agreement . . . ." 321 U.S. at 339. That rule was expressly made applicable to the Railway Labor Act in *Order of Railroad Telegraphers*. 321 U.S. at 347. Indeed, as petitioner expressly concedes, there are at most only two limitations under *J.I. Case*: (1) that the individual contract not constitute "a waiver of any benefit to which the [individual] employee otherwise would be

entitled to under the trade agreement," and (2) that the individual contracts "may not be availed of to defeat or delay the procedures . . . looking to collective bargaining." Pet. 16-17, *quoting* 321 U.S. at 337-38.

Similarly, as the court below noted, *J.I. Case* was reaffirmed in 1987 in *Caterpillar Inc.*, where this Court reiterated that "*J.I. Case* does not stand for the proposition that all individual employment contracts are subsumed into, or eliminated by, the collective bargaining agreement," and that "individual employment contracts are not inevitably superseded by any subsequent collective agreement . . . ." 107 S. Ct. at 2431-32.

Applying *J.I. Case*, lower federal courts have recognized the validity under the RLA of individual contracts that are not in conflict with the railroad-union agreement. See, *e.g.*, *Chambers* v. *Burlington Northern, Inc.*, 692 F.2d 109, 111 (10th Cir. 1982) (individual agreement providing lump sum payment for relinquishment of seniority and acceptance of transfer); *Clausen* v. *Burlington Northern, Inc.*, 98 L.R.R.M. 2844 (D. Mont. 1978) (same); *Antonioli* v. *Lehigh Coal & Nav. Co.*, 451 F.2d 1171, 1175 (3d Cir. 1971) (individual retirement agreements for employees over age 65). See also *Cummings* v. *National R.R. Passenger Corp. (Amtrak)*, 523 A.2d 338, 343 (Pa. 1987) (finding that the individual agreements at issue were "separate from the collective bargaining agreement"), *cert. denied*, 56 U.S.L.W. 3246 (1987). In result, as the court held in the *Grand Trunk* individual resignation case, "[i]ndividual contracts, particularly individual offers and acceptances of retirement or resignation, *are* lawful . . . if they are not inconsistent with" the applicable agreement between the parties. 679 F. Supp. at 699.

In short, the "direct dealing" cases relied on by the IAM—*J.I. Case*, *Railway Express*, and *Medo Photo*—simply lead to the test articulated by the Eighth Circuit

below: that an individual agreement not authorized by the union-railroad contract is still lawful so long as it does not violate or undermine that collective bargaining contract. The IAM's efforts to recast that test (p. 21) are therefore simply without merit.

It is clear that, in order to decide whether the individual retirements at issue here are lawful or not under the "direct dealing" cases, arbitration is required. As noted above, the first test under *J.I. Case* is whether the retirements conflict with the *New York Dock* conditions, that is, whether the severances effect a diminution of the Soo Line's obligations to the affected employees. That, in turn, can be resolved only by construing the *New York Dock* conditions to decide whether, as the IAM claims, they give junior workers a vested right to be furloughed and sit at home or, as the Soo Line believes, they contemplate voluntary retirements of working senior employees in order to avoid such inefficiencies. Accordingly, arbitration is required to resolve the first *J.I. Case* test, and Judge Heaney in dissent was therefore wrong to try to resolve the disputed interpretation himself. The second *J.I. Case* test is easily met by the severance program, for it clearly does not "defeat or delay" collective bargaining. The union is absolutely free, anytime it wants, to serve upon the Soo Line a bargaining proposal under § 6 of the RLA.[8] Accordingly, the IAM can establish that the program is unlawful under *J.I. Case* only if it prevails in arbitration on its claim that the individual severances are incompatible with the *New York Dock* conditions, and hence the Eighth Circuit correctly held that the district court had no jurisdiction.

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[8] As noted below, it is the Soo Line's view that this matter is not a mandatory subject of bargaining; but assuming for purposes of this section that bargaining is mandatory, the IAM is free to commence it immediately.

II. The Decision Below Is Not In Conflict With Any Other Decisions

Petitioner asserts two conflicts justifying review by this Court, but neither in fact exists. The IAM claims first that the decision below conflicts with *J.I. Case* and its progeny as to the permissible scope of "direct dealing" through individual agreements. As shown at page 13-17 above, however, those cases are wholly inapposite here, for it is the Soo Line's position that the *New York Dock* conditions, and their incorporation into the Protective Agreement, gave the railroad full authority for the making of individual severance agreements, and the dispute over that question of interpretation is subject to mandatory arbitration. Moreover, as shown on pages 17-19 above, the decision below in fact fully accords with this Court's "direct dealing" cases, since it applied the proper standard, correctly holding that the lawfulness of the individual severances depends on whether they are in conflict with the *New York Dock* conditions, and remands for arbitration to decide that question. Indeed, *no* court has ever held to the contrary, *i.e.*, *no* court has held that individual voluntary severances by employees covered by *New York Dock* conditions conflict with those conditions or constitute unlawful direct dealing under *J.I. Case.*

The IAM's other claimed conflict is with the Seventh Circuit's holding with respect to another railroad's indivdual severance program in *BRAC* v. *Atchison, T. & S.F. Ry.*, 847 F.2d 403 (7th Cir. 1988). As noted above, however, that case was decided in favor of the *railroad*, and hence the IAM is claiming a conflict between two cases, both of which the unions *lost.* As shown at pages 13-14 above, moreover, the Eighth Circuit's decision in this case is not in conflict with the Seventh Circuit's decision or with any other individual severance case. Indeed the Seventh Circuit, like the Eighth Circuit below, held that the union's challenge was subject to mandatory

arbitration as a "minor dispute."[9] It did so because there was nonfrivolous past practice evidence of an implied agreement between the railroad and the union authorizing individual severances. 847 F.2d at 406-08. Similarly here, as shown at pages 14-15 above, there is substantial evidence that the *New York Dock* conditions affirmatively authorize, and at least do not conflict with, the individual retirements. In fact, because in this case there is an express arbitration clause, the court below correctly observed that it cannot even get into the business of deciding whether the Soo Line's interpretation is arguable. See page 10 *supra*.

In sum, neither IAM nor the dissents below could point to any direct conflict with the majority's decision, and the IAM's effort to generate a conflict with the general "direct dealing" principles developed in *J.I. Case* is wholly unavailing.[10] Finally, as shown at pages 16-17

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[9] Apparently the collective agreement there (unlike the ICC conditions here) had no express arbitration clause; hence the Seventh Circuit relied solely on the "minor dispute" rationale.

[10] Not only is there no conflict on these issues, but the decision below is also supported by the point that the terms of individual voluntary severances are not a mandatory subject of bargaining. As noted above, the Eighth Circuit held that there is "strong support" for this position, but found it unnecessary to resolve the issue. Pet. App. 12a-14a. Under §§ 2 First and 6 of the RLA, 45 U.S.C. §§ 152 First and 156, mandatory bargaining duties extend only to "rates of pay, rules, and working conditions" of employees. See also *Japan Air Lines Co.* v. *IAM*, 538 F.2d 46, 51-52 (2d Cir. 1976). And under 1 Fifth of the RLA, the term "employee" is limited to persons presently "in the service of a carrier . . . ." 45 U.S.C. § 151 Fifth.

In the present case, voluntary prior retirement was a condition to being paid the severance allowance. See Eighth Circuit J.A. 14-17. In *Chemical Workers* v. *Pittsburgh Glass*, 404 U.S. 157 (1971), this Court held that contracts between a company and individual retirees, who agreed to withdraw from a collectively-bargaining insurance plan, did not involve or affect "employees" and hence did not constitute a mandatory subject of bargaining.

above, the IAM's claim that the decision below leaves it remediless is simply untrue. Indeed the unions, represented by the same counsel here, advanced this very same argument—that arbitration denies them a forum for their statutory claims—with respect to the Seventh Circuit's recent holding that the lawfulness under the RLA of a line sale and accompanying furloughs was subject to mandatory arbitration, but this Court denied certiorari. See *Chicago & N.W. Transp. Co.* v. *RLEA*, 855 F.2d 1277 (7th Cir.), *cert. denied*, 57 U.S.L.W. 3376 (1988).

Because the eight IAM members at issue left service prior to receiving their allowances, the size of those allowances was not a mandatory subject of bargaining.

That conclusion is reinforced by § 9 Eighth of the RLA, which expressly does not "require an individual to render labor or service without his consent, nor . . . make the quitting of his labor or service by an individual employee an illegal act . . . ." 45 U.S.C. § 159 Eighth. As the National Railroad Adjustment Board stated in *System Fed'n No. 69, supra*, it "is indisputable that an employee has an absolute right to resign from his job; it seems to be a logical extension of this concept to go further and conclude that an employee has the right to resign in exchange for a monetary consideration." Because the severances here are *entirely voluntary*, thus, they are not a mandatory subject of bargaining.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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